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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 170

E. F. DREW & CO., INC.,

Petitioner,

v.

HARTFORD NATIONAL BANK AND TRUST COMPANY, Trustee, and PHILLIPS EMBROIDERIES, INC.,

Respondents.

PETITIONER'S REPLY BRIEF

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Respondents have misread the petition. The petition is not based upon any assertion that the lower court awarded *all* of petitioner's profits made on sales of vitamin-enriched food supplements. The petition makes it perfectly clear that the lower court computed its award by multiplying a 10% rate times petitioner's gross sales revenue upon such products. (Petition, pp. 10-11). But the fact remains, and has not been denied by respondents, that the sum awarded greatly *exceeds* the respondents' loss (whether figured on the basis of respondents' established royalty—$28,307.47—or on the basis of what respondents claimed at the trial to be a reasonable royalty—$48,769.49), and it is also clear that the lower court *deliberately* went beyond such loss on the basis of its erroneous interpretation of the statute as permitting an award based upon the "benefits, profits or advantage gained by the defendant."

The lower court specifically denied respondents' request to increase the award on the ground of wilfullness. Never-

theless, not only did the award as made greatly exceed respondents' damage, it also greatly exceeded three times such damage—the absolute maximum recovery permitted by the statute under any circumstances, including wilfullness on the part of the infringer. 35 U. S. C. § 284.

The figures in the second column of the table on page 9 of the petition are based upon respondents' own table (106b), where respondents have shown their "reasonable royalty" damages equal to 10% of those figures. Respondents' insinuation that the table is incorrect is wholly unwarranted.

Petitioner submits that the lower court has construed the statute as permitting an award based on the infringer's gains rather than the damage suffered by the patentee, that in so doing the lower court has decided (wrongly, we believe) an important question of federal law, and that the lower court's decision does conflict with the *Livesay* and *Cold Metal* decisions, as pointed out in the petition and not refuted by respondents.

Respectfully submitted

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